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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DONALD LINDSEY MUIR, Defendant and Appellant.	A152772 (Solano County Super. Ct. No. MISC9075)

MEMORANDUM OPINION

Defendant Donald Lindsey Muir appeals from an order denying his application under Penal Code section 4852.01[1] for a certificate of rehabilitation and pardon. Defendant, who among other crimes has suffered a conviction of section 288, subdivision (a) (lewd and lascivious act on a child under the age of 14), agrees he is not eligible for a certificate under the express terms of section 4852.01. He contends, however, that the exclusion of section 288 offenders violates equal protection, as other similarly situated offenders, according to defendant, namely those convicted of section 286, subdivision (d)(2) (sodomy on a child under the age of 14) and section 287, subdivision (d)(2) (formerly § 288a, subd. (d)(2) (oral copulation upon a child under the age of 14), are not excluded from seeking a certificate. Under *Johnson v. Department of Justice* (2015) 60 Cal.4th 871 (*Johnson*), in which our Supreme Court clarified the equal protection

[1] All further statutory references are to the Penal Code unless otherwise indicated.

analysis we are to apply to such challenges, the statutory exclusion of those convicted of section 288 offenses passes constitutional muster, and we therefore affirm.

Neither the background of defendant's section 288 offense, nor the procedural details of the instant proceeding, are relevant to the issue before us, and we therefore do not recite them.

As defendant acknowledges, section 4852.01, subdivision (c) (formerly subd. (d)) states that it "does not apply to persons . . . convicted of a violation of Section 269, subdivision (c) of Section 286, subdivision (c) of Section 287, *Section 288*, Section 288.5, Section 288.7, subdivision (j) of Section 289, or subdivision (c) of former Section 288a." (§ 4852.01, subd. (c), italics added.) Accordingly, on the face of the statute, defendant cannot obtain a certificate of rehabilitation and pardon.

Defendant's equal protection claim has its roots in the successful equal protection claim made in *People v. Tirey*, which generated three opinions, two of which were published. (*People v. Tirey* (2015) 242 Cal.App.4th 1255, 1257 (*Tirey III*).) In the first and second opinions, the *Tirey* court upheld the defendant's equal protection challenge. (*Id.* at pp. 1257–1258.) The defendant had been convicted of section 288 offenses, and he based his equal protection claim on the ground section 288.7 offenders were not also barred from relief. (*Id.* at p. 1259.) In the third opinion, following a grant of review and retransfer, and legislation amending section 4852.01, subdivision (c) to also exclude section 288.7 offenses, the court concluded the new legislation cured the equal protection problem and, at this point, affirmed the order denying the defendant's application for a certificate. (*Id.* at pp. 1259, 1263–1264.)

Defendant here advances the same equal protection claim made in *Tirey*, but based on two different comparative statutes, section 286, subdivision (d)(2) (sodomy on a child under the age of 14) and section 287, subdivision (d)(2) (formerly § 288a, subd. (d)(2)) (oral copulation upon a child under the age of 14).

" ' "The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." ' [Citation.] 'The first prerequisite to a meritorious claim

under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.' [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.' " (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253, italics omitted.)

We have considerable doubt that defendant's equal protection claim survives this initial, "similarly situated," inquiry. A defendant can be convicted under section 286, subdivision (d)(2) or under section 287, subdivision (d)(2) (formerly § 288a, subd. (d)(2)) as merely an aider and abettor. That is not the case under section 288, which applies exclusively to the actual perpetrator of the sexual act inflicted on a child under the age of 14. Additionally, a defendant need not act with any specific intent under section 286, subdivision (d)(2) or section 287, subdivision (d)(2). Section 288, in contrast, reaches those who act "with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child." (§ 288, subd. (a).) The higher mental state required for a conviction of a specific intent crime is "a distinction that is meaningful" in determining whether that defendant is similarly situated to a defendant convicted of a general intent crime. (*People v. Cavallaro* (2009) 178 Cal.App.4th 103, 114 [discussing equal protection related to sections 288 and 261.5]; see *People v. Singh* (2011) 198 Cal.App.4th 364, 371 [section 288, subd. (a) offender "is not similarly situated to offenders convicted under section 261.5 . . . because [the latter] provision[ ] . . . [is a] general intent offense[ ]"]; *People v. Alvarado* (2010) 187 Cal.App.4th 72, 79 [section 288, subd. (a) offenders are not similarly situated to section 261.5 offenders because "[a] section 261.5 offense . . . concerns the general intent offense of committing unlawful sexual intercourse"].)

Even if defendant is similarly situated to section 286, subdivision (d)(2) and section 287, subdivision (d)(2) (formerly § 288a, subd. (d)(2)) offenders, his equal protection claim does not survive the rational basis scrutiny we are to apply under *Johnson*. In *Johnson*, our Supreme Court repudiated the equal protection analysis it had employed in *People v. Hofsheier* (2006) 37 Cal.4th 1185 to sustain an equal protection

challenge to mandatory sex offender registration for (former) section 288a offenders (oral copulation), in contrast to discretionary registration as allowed for section 261.5 offenders (unlawful intercourse). (*Johnson, supra*, 60 Cal.4th at pp. 874–875.)

As *Johnson* explained, "Where, as here, a disputed statutory disparity implicates no suspect class or fundamental right, 'equal protection of the law is denied only where there is no "rational relationship between the disparity of treatment and some legitimate governmental purpose." ' [Citation.] 'This standard of rationality does not depend upon whether lawmakers ever actually articulated the purpose they sought to achieve. Nor must the underlying rationale be empirically substantiated. [Citation.] While the realities of the subject matter cannot be completely ignored [citation], a court may engage in " 'rational speculation' " as to the justifications for the legislative choice [citation]. It is immaterial for rational basis review "whether or not" any such speculation has "a foundation in the record." ' [Citation.] To mount a successful rational basis challenge, a party must ' "negative every conceivable basis" ' that might support the disputed statutory disparity. [Citations.] If a plausible basis exists for the disparity, courts may not second-guess its ' "wisdom, fairness, or logic." ' " (*Johnson, supra*, 60 Cal.4th at p. 881.)

The People posit there is a rational basis for disqualifying the actual perpetrator of criminal conduct inflicted upon a child to which section 288, subdivision (a) applies, but leaving open the possibility of a certificate of rehabilitation and pardon for those convicted of aiding and abetting the specified sex crimes under sections 286, subdivision (d)(2) and section 287, subdivision (d)(2) (formerly § 288a, subd. (d)(2)).

We agree that it is within the realm of possibility that the Legislature could have determined that such aiders and abettors may be less morally (though not criminally) culpable, less likely to reoffend, and more amenable to rehabilitation. And under *Johnson*, that is the extent of our review of the Legislature's distinction between, and different treatment of, convicted offenders. " '[W]hen conducting rational basis review, we must accept any gross generalizations and rough accommodations that the Legislature seems to have made.' [Citation.] 'A classification is not arbitrary or irrational simply

because there is an "imperfect fit between means and ends" ' [citation], or 'because it may be "to some extent both underinclusive and overinclusive." ' " (*Johnson*, *supra*, 60 Cal.4th at p. 887.) People may do things acting together that they would not do alone. Consequently, the Legislature could have rationally concluded that a person convicted of a crime, where he acted in concert with another, may be more likely to truly rehabilitate and less likely to reoffend than someone who commits a similar crime acting alone.[2]

Accordingly, because defendant cannot negate every conceivable basis that might support the Legislature's decision to bar section 288 offenders, but not section 286, subdivision (d)(2) and section 287, subdivision (d)(2) (formerly § 288a, subd. (d)(2)) offenders, his equal protection claim fails.

DISPOSITION

The order denying defendant's petition for certificate of rehabilitation and pardon is affirmed.

[2] That the punishment for sections 286, subdivision (d)(2) and 287, subdivision (d)(2) (formerly § 288a, subd. (d)(2)) offenders is more severe than that for section 288 offenders, is not conclusive of an equal protection challenge. (See *People v. Romo* (1975) 14 Cal.3d 189, 192, 196–197 [rejecting equal protection claim based on fact assault with a deadly weapon could be punished more severely than the greater offense of assault with intent to commit murder; greater punishment for lesser offense might act as deterrent to the lesser conduct, which was more likely to occur than greater conduct].)

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Banke, J.

We concur:

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Humes, P.J.

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Sanchez, J.

A152772, *People v. Muir*